United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7477

To be argued by
STEVEN DI JOSEPH

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLARENCE O. GOKAY, JR., an infant by his mother DOROTHY GOKAY, individually,

Plaintiff-Appellant,

against

MARC ANTHONY'S, INC. d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

DEFENDANT-APPELLEE'S BRIEF

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DEFENDANT-APPELLEE'S BRIEF

Preliminary Statement

Plaintiff is appealing an order (19a)* of the United States District Court, Southern District of New York

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* Numbers in parentheses refer to pages of appendix.

(Conner, D.J.) filed August 27, 1976, which granted "defendant's motion to approve *nunc pro tunc* the filing of its notice of appeal on July 14, 1976" (17a).*

The Relevant Facts

On June 11, 1976, a judgment was entered in favor of plaintiff and against defendant in the sum of $150,000 (3a). A notice of appeal was served upon plaintiff's counsel on July 2, 1976 but was not filed in the District Court until July 14, 33 days after the judgment was entered (4a).

The appeal has proceeded in compliance with this Court's Civil Appeal Scheduling Order. At the time of the pre-argument conference the record on appeal had been filed, defendant's brief had been printed and the appendix was in the process of being finalized by the printer (4a).

On August 19, a pre-argument conference was held and it was not until after defendant's appellate counsel had presented his argument on the merits of the appeal, that he was apprised for the first time of the fact that the notice of appeal had been filed on July 14 (15a).

A motion was promptly made by defendant in the District Court to have the trial judge approve *nunc pro tunc* the filing of its notice of appeal on July 14. Affidavits were submitted in support of the motion explaining the extraordinary circumstances which led to the late filing of the notice of appeal (3a-9a, 14a-17a).

On August 27, Judge Conner granted defendant's motion and it is from that order that plaintiff appeals (19a, 20a).

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* Based upon this same order, this Court has already denied plaintiff's motion to dismiss the appeal for failure to file a timely notice of appeal.

Question Presented

In view of the extraordinary circumstances presented and the absence of any prejudice to the plaintiff, did the court below not properly exercise its discretion in approving *nunc pro tunc* the filing of defendant's notice of appeal on July 14, 1976?

We submit that it did.

POINT I

Since defendant fully demonstrated that extraordinary circumstances had caused its notice of appeal to be filed 33 days after the judgment appealed from had been entered, and because the parties have at all times proceeded with the appeal according to this court's scheduling order the court below did not abuse its discretion in approving *nunc pro tunc* the filing of defendant's notice of appeal on July 14, 1976, especially when there was no demonstration of prejudice to plaintiff.

The extraordinary circumstances resulting in the late filing of the notice of appeal.

At the time defendant's notice of appeal was prepared, the law firm of Bower & Gardner was in the midst of a move of its quarters from the fourth floor of 415 Madison Avenue, New York, New York, to new offices on the seventh and eighth floors of the same building. The move, involving more than 90 of the firm's personnel, including all of the partners in the firm and their secretaries was scheduled to be made during the week of July 5, 1976 (5a).

The notice of appeal herein was prepared *and served* upon plaintiff's counsel on Friday, July 2, 1976. It was intended that the notice of appeal would be taken to the

District Court and filed on the following Tuesday, when the office reopened and after the Fourth of July Holiday weekend.

On Tuesday, Wednesday and Thursday, July 6th-8th, the movers came in, packing more than 200 cartons of files that were scheduled to be moved from the fourth floor to the completed eighth floor installation. The actual move of personnel, files, library and office equipment was carried out on Friday, Saturday and Sunday, July 9th-11th (5a).

Only after unpacking was completed on July 13th was it discovered that the original notice of appeal with affidavits of service had inadvertently been packed up during the move and had not been filed with the District Court prior to July 11th as per the instructions of the managing partner of Bower & Gardner. The notice of appeal was filed immediately (6a).

Plaintiff claims that defendant was guilty of laches in making its motion. This is not so.

For the past six years the firm of Siff & Newman has been appellate counsel for the firm of Bower & Gardner handling virtually all of their appeals in both the State and Federal Courts. As such, Thomas R. Newman was the one who prepared the motion and unquestionably would have moved earlier had he but known of the late filing prior to the conference before Mr. Fensterstock (15a).

On Tuesday afternoon, August 17, plaintiff's counsel telephoned Ms. Billauer, a young associate attorney with the firm of Bower & Gardner, and advised her of the late filing of the notice of appeal. Ms. Billauer checked into the matter the following morning and tried to reach Mr. Newman to advise him of the situation but was unable to do so until noon the following day. By then, the confer-

ence scheduled for Thursday morning at 10:00 a.m. had already taken place before Mr. Fensterstock. That explains why the motion was not made previously (15a).

Although plaintiff's counsel knew for several weeks that the firm of Siff & Newman was handling the appeal herein for Bower & Gardner, he never once mentioned his discovery of the late filing of the notice of appeal to them. Rather, a day and a half before the scheduled conference he telephoned a young, inexperienced attorney at Bower & Gardner, whom he knew to have nothing to do with the appeal, and told it to her (15a-16a).

The following incident is most significant for it illustrates how plaintiff's counsel was waiting to surprise defendant with the late filing at the conference before Mr. Fensterstock.

On August 10, 1976 one of the associates in the firm of Siff & Newman, Steven Di Joseph, Esq., spoke to Mr. Napoli and discussed the portions of the record to be included in the appendix. During their telephone conversation plaintiff's counsel told Mr. Di Joseph in cryptic fashion that he "had something interesting to tell him at the pre-argument conference which he (Di Joseph) would find amusing." Never once did Mr. Napoli give the slightest hint or suggestion that he had known for some time of defendant's late filing of the notice of appeal. In fact, *plaintiff's counsel* was at all times proceeding with the appeal on the merits. He never placed reliance on the late filing and all indications were that he was prepared to defend the appeal.*

A letter written by Mr. Di Joseph to plaintiff's counsel following their telephone conversation on August 10th

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* It is significant that plaintiff filed his brief according to the original scheduling order and argued his position therein solely on the merits.

concerning the contents of the Appendix plainly indicates that even on that date defendant still believed the notice of appeal to have been timely filed (16a, 18a). Plaintiff's counsel said nothing to change that impression though he knew it to be incorrect.

It was within the discretion of the court below to approve the filing of the notice of appeal *nunc pro tunc*.

In *Torockio* v. *Chamberlain Mfg. Co.*, 456 F.2d 1084 (3d Cir. 1972) it was held that if a notice of appeal is filed more than thirty but less than sixty days after entry of the judgment appealed from, the District Court may *at any time* consider a motion to validate the filing within the second thirty days for excusable neglect. On remand, the trial Court in the *Torockio* case validated a filing within the second thirty days (56 FRD 82, aff'd. 474 F.2d 1340 [3d Cir. 1973]).

The same procedure was followed by this Court in *Stirling* v. *Chemical Bank*, 514 F.2d 1030, 1032-1033 (2d Cir. 1975) where the Court held:

> "Here, however, the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable neglect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of the appellants to permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect. See Evans v. Jones, 366 F.2d 772 (4th Cir. 1966); Reed v. People of State of Michigan, 398 F.2d 800 (6th

Cir. 1963). Nothing in Rule 4(a) precludes the district court, more than 60 days after entry of judgment, from granting an extension of time to sanction the late filing of a notice of appeal within the second half of the 60-day period, provided a purported notice of appeal has actually been filed within that period." (cit. omitted).

"Although we thoroughly disapprove of the careless procedure followed by appellants' counsel, who demonstrated a singular disregard for or ignorance of the pertinent rules, we will remand the case, in view of the showing made, to the district court for the purpose of determining whether there was excusable neglect entitling appellants, in the district court's discretion, to an extension of time *nunc pro tunc* to December 19, 1974, for the filing of their notices of appeal. If the district court should so find, the notice filed on that date will be deemed valid as to all appellants except Union Planters National Bank. Otherwise the appeals in 72 Civ. 4476 must be dismissed."

On remand the district court validated the late filing of the notice of appeal.

We submit that as a matter of general policy, disposition of controversies on the merit is favored and that the principle to be applied in this situation is that stated in *Allen* v. *Fink*, 211 App. Div. 411, 415 (4th Dept. 1925):

"The law is not inexorable in all its judgments. The policy of the courts is to be humane, and not unduly harsh and punitive in its treatment of suitors and attorneys who have made mistakes, and to look with tolerance upon errors and defects in pleading and practice, if they may be rectified without affecting substantial rights of litigants."

Since there has been no showing that the court below abused its discretion the order should be affirmed allowing defendant's appeal to proceed on the merits.

When a court has rendered a decision as a result of an exercise of its discretionary powers, that ruling should not be overturned unless there has been a clear abuse of that discretion (*Link* v. *Wabash R. Co.*, 370 U.S. 626 [1962]; *Hines* v. *Seaboard Air Line R. Co.*, 341 F.2d 229 [2d Cir. 1962]; *Cucurillo* v. *Schulte Bruns Schiff Gesellschaft, M.B.H.*, 324 F.2d [2d Cir. 1963]; *Parker* v. *Broadcast Music, Inc.*, 289 F.2d 313 [2d Cir. 1961]).

In this case the court below was presented with a showing of excusable neglect on the part of defendant's counsel. The appeal has proceeded solely on the merits with all briefs as well as the appendix having been filed with this Court. All that remains is for the appeal to be argued. Plaintiff has never demonstrated any prejudice in proceeding with the appeal as originally anticipated and this Court has already denied his motion to dismiss the appeal.

That defendant has a most meritorious appeal is disclosed by its briefs and by the fact that the court below granted the motion "in the interests of justice" after reading defendant's main brief which was attached to the supporting affidavit as an exhibit.

In *Compania De Nav. Trans.* v. *Georgia Hardwood Lum. Co.*, 141 F.2d 652 (5th Cir. 1944), where the Court validated *nunc pro tunc* a defective appeal, it was written:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case,

> which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. *It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve.*" (emphasis added).

It is respectfully submitted that "we have progressed a great distance from the time when failure to dot an i or cross a t made legal proceedings invalid." (*Application of Mullen,* 179 Misc. 144, 37 N.Y.S.2d 974, 976-977). In the interest of justice, defendant should not be deprived of the right to prosecute a meritorious appeal from the $150,000 judgment entered against it because of the inadvertent failure to timely file the notice of appeal arising out of the extraordinary circumstances described above especially when plaintiff has in no way been prejudiced thereby and the prosecution of the appeal has not been delayed or impeded.

CONCLUSION

The order appealed from was a proper exercise of discretion by the district court and should be affirmed.

Dated: October 22, 1976
New York, N. Y.

Respectfully submitted,

BOWER & GARDNER
Attorneys for Defendant-Appellee

STEVEN DI JOSEPH,
CLIFFORD A. BARTLETT,
Of Counsel.

Service of three (3) copies of
the within Brief is
hereby admitted this 26th day
of October, 1976

Harry H. Ingram
Attorney for Pltf Appt